Scepter Ingot Castings, Inc. *and* Stephen L. Merrell

Scepter Ingot Castings, Inc. *and* Shopman's Local Union No. 733 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO. Cases 26-CA-17161 and 26-CA-17345

August 28, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On July 16, 1997, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and explained below.[2]

1. The Union was certified to represent Respondent's employees in 1993. The Respondent claims that it withdrew recognition of the Union in 1995 after receiving information that raised a doubt that the Union continued to represent a majority of unit employees. To support its purported doubt, the Respondent relies, inter alia, on statements employee Penney Hensley made to the Respondent's plant manager, Steve Whitehead, and President Garney Scott. According to Hensley, she told Whitehead she "felt" that the Union had "no standing" and that she "felt like" the employees no longer wanted the Union as their representative; and she told Scott she "felt that [the Union's status] was a gone issue."

We agree with the judge that the Respondent did not have sufficient grounds to support a good-faith doubt that the Union retained the support of a majority of unit employees and, consequently, the Respondent's withdrawal of recognition was unlawful. Our conclusion is not altered by the Supreme Court's decision in *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359 (1998). The Court held that "doubt" meant "uncertainty," so that the test could be phrased in terms of whether the employer "lacked a genuine, reasonably-based uncertainty about whether [the union] enjoyed the continuing support of a majority of unit employees." Id. at 823. We find that Hensley's statements about the Union's "standing" or "status," and her opinion that employees no longer wanted the Union are totally insufficient to support the withdrawal of recognition. These vague statements do not come even close to being objective evidence justifying a withdrawal of recognition, regardless of whether the test is phrased in terms of "good faith reasonable doubt" of the Union's majority support or "genuine, reasonable uncertainty about whether the Union enjoyed the continuing support of a majority of unit employees." See *Henry Bierce Co.*, 328 NLRB 646, 650–651 (1999). We also agree with the judge that the other factors relied on by the Respondent are insufficient to support withdrawal.[3]

2. We agree, for the reasons fully set forth in *Caterair International*, 322 NLRB 64 (1996), that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition from the Union. We adhere to the view, reaffirmed by the Board in that case, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In the *Vincent* case, the court summarized the court's law as requiring that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." Id. at 734.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

As the judge noted, the Respondent admitted the complaint's jurisdictional allegation. The complaint alleged that in the 12-month period ending March 31, 1996, the Respondent sold and shipped from its New Johnsonville, Tennessee facility goods valued in excess of $50,000 directly to points located outside the State of Tennessee and purchased and received at its facility goods valued in excess of $50,000 directly from points located outside the State of Tennessee.

[2] We shall modify the recommended Order to provide that the Respondent shall make whole employees for any expenses ensuing from the Respondent's unilateral changes in medical insurance coverage and contributions. See *Kraft Plumbing & Heating*, 252 NLRB 891, fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).

[3] As found by the judge, circulation of the decertification petition did not occur until after the withdrawal of recognition. Thus, in agreement with the judge, we find that the Respondent cannot rely on that petition. Based on the judge's factual findings, we also find no merit in Respondent's contention that the Union abandoned the bargaining unit. Finally, we also agree with the judge that the employee turnover was insufficient to support withdrawal.

Although we respectfully disagree with the court's requirement for the reasons set forth in *Caterair*, we have examined the particular facts of this case as the court requires and find that a balancing of the three factors warrants an affirmative bargaining order.

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the employer's withdrawal of recognition. At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the ill effects of the violation.

Moreover, we note that, in addition to unlawfully withdrawing recognition, Respondent unilaterally granted pay raises to bargaining unit employees, unilaterally changed medical insurance coverage for bargaining unit employees, unilaterally changed work rules without consulting with the Union, and unlawfully discharged an employee. These unilateral actions clearly signal to employees the Respondent's continuing disregard for their bargaining representative and would likely have a long-lasting effect.

(2) The affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured, by the possibility of a decertification petition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent's violations because it would permit a decertification petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective bargaining agreement. Such a result would be particularly unfair in circumstances such as those here, where litigation of the Union's charges took several years and the Respondent's unfair labor practices were of a continuing nature and were likely to have a continuing effect, thereby tainting any employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued Union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the allegations in this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Scepter Ingot Castings, Inc., New Johnsonville, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraph 2(g) and renumber the subsequent paragraphs accordingly.

"(g) Make employees whole for any expenses ensuing from the Respondent's unilateral changes in medical insurance coverage and contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987)."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT do anything that interferes with, restrains, or coerces you with respect to these rights, and more specifically:

WE WILL NOT withdraw recognition from or fail and refuse to bargain in good faith with Shopman's Local Union No. 733 of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO, while that Union is lawfully entitled to recognition as the exclusive bargaining representative of all employees in the following appropriate unit:

> All production and maintenance employees, shipping and receiving department employees, and custodians employed by us at our New Johnsonville, Tennessee facility; excluding all office clerical employees, metal control clerk, personnel clerk/purchasing agent, plant manager, plant engineer/maintenance superintendent, production techni-

cal manager, cast house general foreman, rotary general foreman, all working foremen, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT announce and unilaterally implement changes in wage rates and employee insurance benefit plans.

WE WILL NOT unilaterally implement changes in the working rules imposed on you.

WE WILL NOT discharge you pursuant to policy changes in work rules which were implemented unilaterally without notice to the Union and without affording the Union the opportunity to bargain over such changes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, on request by the Union, rescind the early October 1995 changes in pay rates for unit employees, the changes in the medical insurance coverage and the contribution required by employees toward premiums, the November 17, 1995 policy statement concerning putting steel in the furnaces, and the requirement that employees sign such policy statement.

WE WILL, within 14 days from the date of the Board's Order, offer Stephen L. Merrell full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Stephen L. Merrell whole for any loss of earnings and other benefits resulting from his unlawful discharge on November 17, 1995.

WE WILL, within 14 days from the date of the Board's Order, remove form out files any reference to the unlawful discharge of Stephen L. Merrell and WE WILL, within 3 days thereafter, inform him that this has been done and that the discharge will not be used against him in any way.

WE WILL make employees whole for any expenses ensuing from out unilateral changes in medical insurance coverage and contributions.

SCEPTER INGOT CASTINGS, INC.

Rosalind Thomas, Esq., for the General Counsel.

Ronald G. Ingham, Esq. and *John Y. Elliott III, Esq. (Miller & Martin),* of Chattanooga, Tennessee, for Respondent Scepter.

Carroll M. Cate, Dist. Rep. (Iron Workers), of Dandridge, Tennessee, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a withdrawal of recognition case. Finding in favor of the Government, I further find that Scepter unlawfully withdrew recognition from the Union about October 1, 1995, and that the unilateral changes Scepter thereafter implemented also were unlawful. I also find that, as a result of one unilateral change, Scepter unlawfully discharged Charging Party Stephen L. Merrell. I order Scepter to offer full and immediate reinstatement to Merrell and to make him whole, with interest.

I presided at this 2-day trial in Nashville, Tennessee on November 18–19, 1996. Trial was pursuant to the April 25, 1996 order consolidating cases, consolidated complaint, and notice of hearing (complaint) issued by the General Counsel of the NLRB through the Regional Director for Region 26 of the Board.

The complaint is based on a charge filed November 30, 1995 (and amended on March 13, 1996), by Stephen L. Merrell (Merrell) against Scepter Ingot Castings, Inc. (Scepter) in Case 26–CA–17161, and on a charge filed in Case 26–CA–17345 on March 21, 1996, against Scepter by Shopman's Local No. 733, of the International Association of Bridge, Structural and Ornamental Iron Workers, AFL–CIO, (Union or Local 733).

Although Merrell's original charge appears to be by him as an individual (and does not expressly list Section 8(a)(5)), his amended charge, in 26–CA–17161, names the Union as the Charging Party, with Merrell signing as "Committeeman." Even if Merrell's charge is treated as being by him in his individual capacity, as the complaint does, there is no pleading problem with his filing an 8(a)(5) charge, for anyone may file a charge. *M. J. Santulli Mail Services,* 281 NLRB 1288, 1296 (1986). Indeed, if a union did not act, employees could be left without protection if they could not file 8(a)(5) charges, at least as to unilateral changes adversely affecting unit employees.

The pleadings establish that the Union was certified on May 7, 1993 as the exclusive collective-bargaining representative, under Section 9 of the Act, of the employees in the following bargaining unit:

> All production and maintenance employees, shipping and receiving department employees, laboratory technician, and custodians employed at Scepter Ingot Castings' New Johnsonville, Tennessee facility; *excluding* all office clerical employees, metal control clerk, personnel clerk/purchasing agent, plant manager, plant engineer/maintenance superintendent, production technical manager, cast house general foreman, rotary general foreman, all working foremen, professional employees, guards and supervisors as defined in the Act.

As stipulated by the parties (1:8),[1] on April 29, 1993, a Board-conducted election was held for the employees in the unit described above, and the Union won.

The parties also stipulated (1:9–11) that the unit description set forth above inadvertently included "laboratory technician," but was certified with that classification included. During contract negotiations, the parties agreed that the classification of laboratory technician should be excluded. I find that the

[1] References to the two-volume transcript of testimony are by volume and page. Exhibits are designated GCX for the General Counsel's and RX for Respondent Scepter's.

agreed-on unit description, which does not include the classification of laboratory technician, describes an appropriate bargaining unit within the meaning of Section 9 of the Act.

The complaint alleges, and Scepter denies, that at all times since May 7, 1993, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit employees. Actually, the correct date for the allegation is that of the election, April 29, 1993, for the bargaining obligation, in the sense of no unilateral changes, attaches as of the Union's election victory, and then ripens into plenary status with the certification. *Kirkpatrick Electric Co.,* 314 NLRB 1047, 1049 (1994).

In the Government's complaint, the General Counsel alleges that Respondent Scepter violated Section 8(a)(5) of the Act by, about October 3, 1995,[2] unilaterally changing wage rates and employee insurance benefit plans, by withdrawing recognition from the Union about October 4, by unilaterally changing, about November 17, respecting work policy and discipline of employees when steel is found in Scepter's furnaces, and discharging, about November 17, 1995, Charging Party Merrell pursuant to the unilateral changes. By its answer, Scepter denies.

For an affirmative defense, Scepter pleads that the Union "has abandoned its collective bargaining status." On brief, Scepter concedes that it "lawfully withdrew recognition from the Union at a point when it had a good faith, reasonable doubt that the Union enjoyed the support of a majority of the bargaining unit employees at the New Johnsonville facility." (Brief at 2). Further (Brief at 13):

> Scepter does not dispute the fact that it gave all employees a wage increase and amended its group health care plan on or about October 3, 1995, without negotiating with the Union. Likewise, Scepter does not dispute the fact that it required all employees to sign an acknowledgment stating that they were aware of Scepter's policy concerning steel banding in the furnaces without negotiating with the Union. However, by the time these activities were undertaken by Scepter, it was aware of the Union's minority status and had withdrawn its recognition of the Union as the exclusive bargaining representative of the employees at the New Johnsonville facility.

Scepter therefore admits withdrawing recognition from the Union by no later than about October 1, 1995. I so find, and I shall use October 1, 1995, as the date of that withdrawal of recognition.

Scepter is a corporation with an office and place of business in New Johnsonville, Tennessee, where it manufactures and sells aluminum ingots. The pleadings establish that the Board has both statutory and discretionary jurisdiction over Scepter, and that Scepter is an employer engaged in commerce within the meaning of the statute. The parties stipulated (1:8) that Local 733 is a statutory labor organization.

For witnesses, the General Counsel called Carroll M. Cate, a district representative for the International Association of Bridge, Structural and Ornamental Iron Workers (1:58); William Charles Davidson, a unit employee and member of the Union's bargaining committee until late 1995 (1:114); and Charging Party Merrell (2:225). The General Counsel then rested (2:278). Scepter then called Stephen Whitehead, formerly Scepter's plant manager who now works for an employer in Oklahoma (2:279–280); Penney Hensley, a former employee of Scepter who also served on the Union's bargaining committee through the 22 bargaining sessions (2:313–315); Joseph Hooper, a member of the bargaining unit (2:326; RX 7); and Ronald G. Ingham, Scepter's attorney and chief spokesman for Scepter at the collective-bargaining sessions (2:280, 333–334). Scepter then rested (2:395). There were no rebuttal witnesses.

My decision is based on the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent Scepter. The General Counsel attached to the Government's brief a proposed order and proposed notice to employees. (The Board's rules do not require that briefs to the judges contain a table of contents and a table of authorities cited, and Scepter's brief does not contain these aids.)

FINDINGS OF FACT

A. The Issue of Scepter's Good-Faith Doubt

1. The 22 bargaining sessions

District Representative Carroll Cate served as the Union's chief negotiator in the 22 bargaining sessions which began July 22, 1993, and ended with the meeting of May 4, 1995. Assisting Cate on the Union's bargaining committee were three to four unit employees. (1:60). Scepter's bargaining committee consisted of Attorney Ronald Ingham, chief spokesperson, and Plant Manager Steve Whitehead, although for the first three or four meetings President Garney Scott also attended. (2:280–281).

The 22 formal bargaining sessions were spaced as follows (RX 8): 7 in 1993, 12 in 1994, and 3 (two in mid-January and the final one on May 4) in 1995. There is no dispute that, over the course of the 22 bargaining sessions, the parties reached agreement on a substantial number of issues. An exhibit in evidence (RX 9) shows over two dozen articles tentatively agreed to, with 10 items open—including such matters as hours of work, overtime, seniority, checkoff, grievance-arbitration, and strikes/lockouts. Respecting checkoff, Cate (2:201–202) and Ingham (2:373) agree that Ingham told Cate at the last meeting, on May 4, that if the parties reached a contract, Scepter would give checkoff.

As to some of the open items, Cate and Ingham tentatively agreed on them at two off-the-record, or informal, meetings at Ingham's Chattanooga, Tennessee office about December 4 1994, and January 10, 1995. (1:65; 2:346–348; RX 9). As the list of tentative agreements (RX 9) reflects, other than about seven topics agreed to at the December 1994 informal meeting, virtually all other tentative agreements were reached during 1993. All may have been, but the list does not show dates for three topics—items 35, 36, 37. (RX 9 at 2).

Scepter's preliminary complaint is that negotiations dragged during 1994 and 1995 because the Union's bargaining committee, especially Cate, would waste time talking about matters unrelated to the bargaining. For example, Penney Hensley, one of the original members of the Union's committee, testified (as a witness called by Scepter) that she became troubled by the progress of the negotiations, concluding there was a "stalemate," that "We weren't getting anywhere," and that she was just wasting her time. (2:315, 324). Hensley expressed this opinion to Plant Manager Whitehead on two or three occasions, beginning about the summer of 1994, and during the time of the contract negotiations. She also told Whitehead that she felt that

[2] All dates are for 1995 unless otherwise indicated.

the Union had no standing, was not functioning, and that the employees no longer wanted the Union to represent them. (2:315–316, 321-322). [Whitehead recalls only that Hensley said, by late August 1995, that the Union "was done." (2:286).] Similarly, on three or four occasions of casual conversations, beginning about the summer of 1994, Hensley also told President Garney Scott, that no one was interested in the Union. (2:318, 323). In August 1995, Hensley took the position of personnel clerk, a job outside the bargaining unit. (2:316, 324-325). As of the trial, Hensley was employed with another company. (2:314).

Clearly the parties were taking a very long time to negotiate a contract. Nevertheless, progress, however slow, was still being made as of the final meeting on May 4, 1995. Thus, as earlier noted, checkoff was removed as an issue if the parties reached an overall contract. Ingham concedes that the parties discussed arbitration, with Ingham, apparently for the first time, proposing loser-pay arbitration. Cate declined that suggestion, and countered that the Union would give in on working foreman if Scepter would agree on (the Union's proposal for) arbitration. Ingham declined. (2:372). Despite over 4 hours of apparent serious discussion of the outstanding issues (plus one 15-minute span when Cate talked about slot machines, 2:372), no tentative agreements were reached other than the checkoff item. As Ingham did not have his calendar, no new meeting date was set. (2:373).

2. Events from May 4, 1995 to October 1995

Cate called Ingham several times after the May 4 meeting, into June 1995, and Ingham returned some of these calls, but one or the other person was never available. (1:72; 2:185-187). Cate then sent a letter (GCX 5), dated June 5, asserting that he had left dates on Ingham's voice mail and with Ingham's secretary, asking for Ingham to respond with dates of availability. When Cate received no response, he called again about half a dozen times until about mid-July, at which time he ceased calling. Cate received no response to the messages he left. (1:75-79). Although Cate's pretrial affidavit shows that the representatives played "telephone tag" to June 5, with no reference to calls thereafter, that date apparently was in reference to the date of his June 5 letter. This is so because Ingham's own telephone-message records, of messages taken by Ingham's secretary, show that Cate called on June 23. (RX 16; 2:388). In any event, Ingham, who concedes (2:390) that he was to contact Cate after the May 4 meeting with a suggested date for the next meeting, admits (2:390) that he never thereafter contacted Cate regarding a future meeting date. I credit Cate's version that, after waiting in vain for 2 to 3 weeks for a response to his June 5 letter, he resumed calling Ingham's office and did so until about mid-July. Cate received no response to these calls. (1:79).

Cate did receive a response to his request for a list of employees in the bargaining unit. This request apparently was by telephone in late June, for by letter dated June 30 (RX 3), Ingham forwarded to Cate a list, as of June 29, 1995, of Scepter's hourly employees, with addresses, telephone numbers, and hire dates. Cate concedes that he took this seniority list [the names are in alphabetical order and not listed by seniority date] and inspected it to determine who was still employed and who had been hired after the April 29, 1993 election. (2:193–194). Although the record is not entirely clear on the matter, I infer from Cate's description of the document as a seniority list, and the fact that the General Counsel did not object, that the "hourly" employees listed comprise the bargaining unit as of June 29, 1995. The list has 70 names. Ingham testified that such number was the peak employment at the facility. (2:383).

As an inspection of the list discloses, of the 70 names listed, 51 (or about 72.9 percent) were hired after the election of April 29, 1993. Scepter argues (2:192; Brief at 8) that the list, and Cate's inspection of it, demonstrates that Cate recognized that he no longer had the following among the bargaining unit that he once had. In July 1995 Cate met with three members of the Union's bargaining committee, and he continued to make several calls a week to Steve McBride, who functioned as the leadperson of that committee. [Sadly, McBride was killed in an automobile accident in late October.] Cate's next contact with Scepter was by letter dated October 3, 1995 to (President) Garney Scott, copy to attorney Ingham, the text of which reads (GCX 6):

> Despite my letter to your attorney, Ron Ingham, a few weeks ago and numerous phone calls concerning dates for negotiations, I have not received any response whatsoever.
>
> Therefore, I will direct my letter to you requesting several dates for negotiations with your Company. I will also offer you dates of October 19, 20, 30 and 31 and also November 1 and 2.
>
> I am looking forward to resuming negotiations and hope to receive a response as soon as possible.

Cate credibly testified that he received no response to this letter. (1:82; 2:197, 211). At the October 31 wake for Steve McBride, Cate briefly told Plant Manager Whitehead that he would like to resume negotiations. Whitehead said that Cate needed to contact Ingham. Cate's additional version, which I credit, is that he said he had already written letters without success. (1:83; 2:211–212, Cate; 2:283, Whitehead). According to Ingham, Whitehead, or someone in management, told him that Cate, at the funeral home, had made a comment about needing to "get together," with no suggestion as to dates. "We simply took it as just an idle sort of comment." (2:375). Of course, there was nothing "idle" about Cate's letter of October 3, and the letter suggests dates. And that takes us to the issue which, as framed by witness Ingham (2:391), is whether Scepter had a legal obligation to meet and bargain with the Union.

3. The question of Scepter's good faith belief

In addition to Hensley's testimony about her 1994–1995 statements to Plant Manager Whitehead and to President Scott, Scepter contends that management heard rumors that a petition was circulating among employees to decertify the Union. Attorney Ingham testified that "at a point in time" he heard that there had been a petition, signed by a significant number of employees, to, apparently, decertify the Union. (2:374). Ingham does not specify a time. However, his statement follows his testimony that from early June 1995 to late fall 1995 both Whitehead and Scott had told him there was inadequate support for the Union, apparently basing their statements on expressions made to them by Penney Hensley. (2:374). Ingham's source for all his information came from Scott, Whitehead, Vice President Lynn Jackson, and unnamed supervisors. (2:294–295, 389).

Actually, circulation of the petition to remove the Union was not begun until late 1995 to early 1996. Such was the testimony of furnace operator Joseph Hooper. (2:329). Thus, although some 37 to 40 employees signed the petition during the week that it was circulated (2:328, 330, 332), it is clear that

such occurred after October 1, 1995, because Hooper specifically recalls that it came after the [November 17] discharge of Stephen Merrell. (2:331). Plant Manager Whitehead testified that the first time he heard about an employee petition was at the trial. (2:286). Hooper testified that the week-long circulation effort was done outside the view of management. (2:330). I find that the time estimates by Hensley of about October 1995 when she heard about the petition (2:317), and "early '95" by Charles Davidson (2:158–159), are faulty recollections brought about by the passage of time. The parties stipulated that no such petition was ever filed. (1:139). Ingham testified that no petition was ever presented to Scepter. (2:391). Hooper testified that the petition effort died when Kenneth Melton, who drafted and maintained custody of the petition, was laid off. (2:329–331).

On brief, Scepter relies on the petition to decertify, not as one more factor supporting its good-faith belief (since no petition was ever filed or presented to Scepter), but, rather, as evidence which confirms that its October 1, 1995 good-faith belief was justified. (Brief at 20–21). However, as the petition did not circulate until well after Scepter's (unlawful, as I find) October 1 withdrawal of recognition, then it is presumed that it resulted from the unlawful acts. *Lee Lumber & Building Material Corp.,* 322 NLRB 175 (1996).

Finally, Scepter argues that employee turnover is a factor supporting the withdrawal of recognition when the factor supplements "other objective considerations." (Brief at 19). Passing for the moment the question of whether there were other "objective" considerations as of October 1, 1995, I first consider the turnover matter.

As already noted, the June 29, 1995 seniority list reflects that, as of that date, some 72.9 percent of the bargaining unit had been hired since the April 29, 1993 election. The seniority list of November 12, 1996 (RX 7) reflects that, by that date, the bargaining unit had dropped to 45 employees, with only 14 of the 45, or 31.1 percent, having a seniority date earlier than the election of April 29, 1993. As Scepter acknowledges, under Board law new hires are presumed to support the bargaining representative in the same ratio as those whom they have replaced.

Scepter's problem is that it has no sufficient objective evidence that a majority of unit employees did not, as of October 1, 1995, want the Union to represent them. The closest Hensley's remarks come to that is her statement that she told Plant Manager Whitehead that she, Hensley, "felt like" the employees no longer wanted the Union to represent them. (2:322). That expression of her opinion, plus her opinion, as Whitehead recalls, that the Union was "done," fall far short of the objective evidence that bargaining unit employees themselves are expressing a desire that the Union leave. Attorney Ingham's testimony (2:373–374, 388–390) regarding alleged employee dissatisfaction, aside from being hearsay reports from management, is nothing more than his generalized belief that the Union did not represent a majority of the bargaining unit.

In short, I find that Scepter has not carried its burden of proving that, as of October 1, 1995, it had a good-faith doubt, founded on a sufficient objective basis, that the Union lacked majority status. See *NLRB v. Curtin Matheson Scientific,* 494 U.S. 775 (1990). Scepter's evidence must be "clear, cogent, and convincing." *Torch Operating Co.,* 322 NLRB 939, 943 (1997). Coming nowhere near reaching that standard, the evidence fails even to get over the scintilla "hurdle." Accordingly, I find that, as alleged, Respondent Scepter violated Section 8(a)(5) of the Act when, about October 1, 1995, it withdrew recognition from the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit. I therefore shall order Scepter, on request, to recognize the Union and to bargain with the Union.

B. The Unilateral Changes

1. Wage rates and medical insurance

a. Facts

Complaint paragraph 11 alleges that, about October 3, 1995, Scepter, at an employee meeting at its facility, "announced changes in its wage rates and its employee insurance benefit plans." By its answer, Scepter denies. Scepter should have admitted the factual allegation.

As Scepter makes clear on brief (Brief at 9), there is no dispute that, effective October 1, 1995, Scepter made "several changes, modifications, and amendments to the Scepter group health care plan. (GCX 3)." Before October 1995 employees did not have to contribute under Scepter's health care plan, for Scepter paid it all. (1:129–130, Davidson). As provided in one (GCX 2) of the papers, dated October 4, 1995, a one-page memo (with one-page attachment of new pay scales) addressed to all Scepter employees from (Vice President and General Manager) Lynn Jackson, and distributed to all employees about that day or the day before (1:131), and as Plant Manager Whitehead told the employees in shift meetings that day, employees would begin contributing from $19 to $24 a month for medical insurance coverage effective October 1, 1995. (Moreover, substantive changes were made in the coverage.) During the contract negotiations, Scepter had not proposed such changes. (1:130).

"To help offset" the new contribution now required from employees, Jackson's October 4 memo advises, a general increase of 15 cents per hour was granted effective October 2, 1995. Davidson testified that his wage increase was 40 cents per hour. (1:130). Charging Party Merrell testified about the October notification, but does not specify the amount of his raise. (2:231). If Davidson indeed received 40 cents, that possibly included a merit increase as well as the general increase of 15 cents. No evidence disputes the changes, and witness Ingham testified that Scepter did not give the Union prior notice of the insurance changes and general wage increase. (2:387). This confirms Union Representative Cate's testimony. (1:89–90). Although Ingham had told Cate, during one of the two December 1994–January 1995 informal meetings, that Scepter wanted to have employees contribute toward their medical insurance premiums, and Cate there replied that he was willing to negotiate on the matter, there was no discussion of specific figures or ratios. (2:221, 223).

Similarly, respecting wages, at one of the informal meetings Ingham proposed a 5-year contract with a 3-percent raise each year. Cate rejected that proposal as inadequate. (1:86; 2:202). The subject of raises was never mentioned before the full bargaining committee. (1:121, 130-131; 2:323).

b. Discussion

Given the lack of dispute that Scepter made the unilateral changes, as alleged, what is Scepter's defense? Aside from Scepter's assertion that the changes were lawful because Scepter, as of October 1, 1995, no longer had a duty to recognize and to bargain with the Union—an affirmative defense which, I

already have found, has no merit—Scepter advances the claim that the Union "waived" its right to bargain. Scepter's waiver argument (Brief at 21) begins with Union Representative Cate's testimony that he learned of the changes, including the wage increase, about October 3, when employee Steve McBride called and told him. (1:90; 2:207). Thereafter Cate did not serve a demand on Scepter on this specific subject, and even waited over 5 months before filing the unfair labor practice charge in Case 26–CA–17345. As Cate recalls, with some uncertainty, he already had mailed his letter (GCX 6) of October 3 to (President) Garney Scott requesting a resumption of negotiations and suggesting dates. (1:90-92; 2:207–208).

Cate's October 3 letter makes no reference to the unilateral changes. Cate sent no follow-up letter specifically referencing the unilateral changes and demanding that Scepter bargain over them. Cate waited over 5 months before he filed the Union's unfair labor practice charge in Case 26–CA–17345 attacking the unilateral changes. Charging Party Merrell's March 13, 1996 amended charge in Case 26–CA–17161 makes clear that Merrell alleges that his discharge was the result of his refusal to sign a form that came from a unilateral change in terms and conditions of employment.

Cate explains his 5-month delay in filing the Union's unfair labor practice charge on the basis that he knew he had 6 months in which to file a charge. (1:92; 2:208–209). The General Counsel contends there is no evidence of waiver. (Brief at 27).

Respondent's waiver argument is without merit. When Scepter made its unilateral changes, effective October 1–2, 1995, with no prior (or even post) announcement to the Union, the Union—when it did learn—was faced with a fait accompli. Accordingly, the Union was not required, before filing its unfair labor practice charge, to seek to bargain with Scepter and to persuade Scepter to reverse the fait accompli. As of the fait accompli, Scepter had violated the Act. *Formosa Plastics Corp.,* 320 NLRB 631, 651 (1996); *Intersystems Design Corp.,* 278 NLRB 759, 760 (1986). I therefore shall order Scepter, on request, to meet and bargain with the Union on these changes. Should the Union insist that Scepter rescind the unlawful changes, Scepter must do so.

2. Steel banding policy

a. Facts

Complaint paragraph 12 alleges, and Scepter denies, that about November 17, 1995, Scepter "changed its work policy regarding discipline of employees when steel was found in its furnaces, and required all employees to sign this policy." Paragraph 15 alleges that about November 17 Scepter fired Charging Party Merrell pursuant to the changed policy described in paragraph 12. Scepter denies.

Much of the evidence here is undisputed. For years Scepter has experienced a problem with steel banding finding its way into the furnaces. Steel banding in the molten aluminum will produce inferior, or off-grade, aluminum. It is a costly problem for Scepter. For years supervisors usually have told employees not to put steel bands into the furnaces. There is no evidence, however, that anyone had ever been disciplined for doing so before November 1995. [After the events at issue here, a supervisor was fired for allowing his crew to place steel bands in a furnace. (2:166–167, 271, 308, 312).] On occasion, in the past, to assist in charging a furnace, or even to add weight, a supervisor would tell employees to allow the steel banding to go into a furnace. (2:229, 248, 249, 253, Merrell).

Nevertheless, it is clear that the general rule was that employees were not to put steel banding into the furnaces. There is no dispute that, before October 1995, no specific penalty was attached to the conduct of placing steel into a furnace. There is some dispute whether the problem became worse during 1993–1994, with W. Charles Davidson testifying No (2:164), and (former) Plant Manager Whitehead testifying Yes (2:287, 307–308). In crediting Davidson, I note that Scepter never raised the subject of steel banding in the furnaces during the bargaining negotiations, even though work rules were mentioned. (1:93, 136–137:2:214–215, 223).

About mid-October 1995, Plant Manager Whitehead posted a notice (no copy in evidence) to all employees telling them that they were not to place steel banding into the furnaces. In this memo, Whitehead warned employees that anyone disobeying the notice would be subject to discipline, including discharge. (2:228–229, 244, 248–249, Merrell; 2:288–290, Whitehead). Because the notice helped alleviate the problem only temporarily, on November 17 Scepter ordered employees to sign a written policy statement. The text of the written statement initially presented to some employees, including Charging Party Merrell (2:226–227), reads (GCX 4):

> I understand that putting steel (e.g., banding) in any furnace is absolutely prohibited. I realize that I am subject to immediate discharge if I am ever caught doing so. Additionally, if I knowingly and willfully allow others to do so, I am subject to the same action.

In part because the wording of the foregoing statement is ambiguous in terms of what burden is placed on an employee resulting from actions by others, Whitehead revised the statement to read (2:306–307; RX 5):

> I understand that putting steel bands in the furnace is absolutely prohibited. I realize that I am subject to immediate discharge if I am ever caught doing so. Additionally, I am aware that if I see someone else putting steel bands in the furnace and attempt to conceal the fact, I am subject to the same action.

There is no dispute that Charging Party Merrell refused to sign. There is a dispute over which document Merrell was tendered when he eventually was taken before Whitehead and told that he must sign it as a "job duty" or "job instruction." Merrell adheres to his view that it was GCX 4 (2:255–257, 268), whereas Whitehead asserts that it was the revised form, RX 5 (2:290–294, 297, 305, 307). As Merrell's objections (he could not be responsible for others, and he could not see what was inside a bale of material) remained the same that day, and as there is no evidence Whitehead explained that the form he was presenting was a revised version, I find it more likely that Merrell is correct in his recollection, and I credit him.

When Merrell asked Whitehead what he meant by a "job duty" (2:227–228, 269) or "job instruction" (2:297, 305), Whitehead said he had no further explanation. (2:227–228, 297). Whitehead did not tell Merrell he could be fired if he did not sign because he thought that would be considered a threat. (2:297). When Merrell refused, Whitehead told him that he was terminated. (2:238, 270). Merrell was then processed out, with Whitehead filling out the Separation Notice (GCX 7) providing that Merrell was discharged for "Failure to follow instructions." Merrell understood this to refer to his failure to comply with the order to sign the statement about not putting

steel into the furnaces (2:245–246), and that is the explanation which Scepter gave at Merrell's ensuing unemployment compensation hearing (2:266, 394).

Although Whitehead asserts (2:296) that Merrell was terminated under Scepter's longstanding written rule making an employee subject to immediate discharge for insubordination (GCX 8 at 12), the written rules (GCX 8) make no reference to placing steel in the furnaces. Moreover, Whitehead acknowledges that, before November 17, 1995, the policy statement in issue was not a condition of employment. (2:308). Whitehead admits he never furnished a copy of the document to the Union (2:309), even though he knew at the time that the Union wanted to resume negotiations (2:310–311).

b. Discussion

Aside from Scepter's waiver argument, which, I find, has no merit, for the same reasons expressed in relation to the wage rate and medical insurance benefit changes, Scepter defends on the ground that the change was not material, substantial, and significant[3] because the October posting merely reduced to writing a longstanding policy, citing cases such as *Bellevue Memorial Park,* 309 NLRB 401, 405 (1992) (longstanding rule of discharge for theft reduced to memo—no significant change). The situation is different here, however, because Whitehead's posted notice specifically warned of possible discipline, including discharge.

But, Scepter further argues, even establishing the penalty of discharge is not an unlawful change because it merely adds a specific sanction, or level of discipline, for a work-rule violation, as opposed to an entirely new work rule. Scepter cites cases such as *La Mousse,* 259 NLRB 37, 49–50 (1981). The General Counsel cites no cases concerning a unilateral imposition of a penalty for violation of a preexisting work rule.

There is no dispute that, for the most part, a work rule existed here orally—Don't load steel banding into the furnaces. While no discipline was ever imposed before October 1995 for doing such, and no discipline of any kind had ever been mentioned, the Employee Handbook has a written disciplinary system. Rule A.8 provides that an employee "may" suffer immediate discharge if he does "Deliberate damage to company property. . . ." (GCX 8 at 12). Rule B.1. (GCX 8 at 12) prohibits the waste or abuse of materials, and provides that a violation of this rule can lead to discharge on a second offense. However, Scepter never relied on these rules—and probably for good reason. As to the first, there is evidence that in some situations in the past supervisors have told employees to load the steel banding into a furnace. An employee could argue that the supervisor told him, or that he thought he was merely doing some good because in the past a supervisor had told him to do it. The same situation would apply to any effort to use the second rule.

Thus, while Scepter's preexisting written work rules may be broad enough to be interpreted so as to cover putting steel into the furnaces, the rules were never invoked for that in the past, and Scepter does not rely on them. That is why, apparently, Scepter felt a need for Plant Manager Whitehead to post his October 1995 warning. The complaint does not attack Whitehead's October warning. The complaint does attack the November 17, 1995 action, of formalizing what before had been an informal rule honored in the past by an occasional exception by a supervisor. The situation is rather similar to that in *Sygma Network Corp.,* 317 NLRB 411, 417 (1995), where the new rule required discharge for a violation, but before the unilateral change there was no such requirement.

Not only was the formalization a unilateral change by (1) converting the previous informal and occasional rule to a written policy statement which would apply at all times, contrary to past practice, but (2) the element of discipline was made an important part of the rule, contrary to the past practice, and (3) employees had to sign as a condition of employment, an admitted change from past practice. Moreover, the policy statement itself, in the version (GCX 4) presented to some, including Charging Party Merrell, is ambiguous at best and dangerous at worst. That first statement (GCX 4) at worst could be interpreted as requiring an employee to physically intervene to stop another employee who is about to put steel into a furnace—something never required under the past practice. Such interpretation, of course, could create a dangerous confrontation right at the furnaces themselves. Had Scepter not unlawfully deprived unit employees of their lawful bargaining representative, Scepter would first have presented this ambiguous and potentially dangerous statement to the Union.

Instead, without the benefit of union representation, and without the help of a union representative to point out the ambiguity, with its potential for a dangerous interpretation, and negotiate for a document which would clearly describe the past practice, Charging Party Merrell had to represent himself in the pressure-cooker atmosphere of a direct order from the plant manager. Congress outlawed Scepter's unilateral and heavy-handed style in 1935, as amended in 1947. It follows, and I find, that Scepter's discharge of Charging Party Merrell, because he refused to sign General Counsel Exhibit 4, violated 29 USC 158(a)(5). I shall order Scepter to offer full and immediate reinstatement to Merrell and to make him whole, with interest. *Sygma Network Corp.,* 317 NLRB 411 fn. 1, 417 (1995).

Respecting the second policy statement (RX 5), Scepter must revoke it as well as the first statement (GCX 4), which some employees at the beginning apparently signed. This is so because the revised version (RX 5) suffers from most of the same faults as the first one even though it may be less ambiguous and not contain the potential for danger that the first one does. Discipline was added as an important component, and the situation, by the statement, is converted into a formalized rule whereas before there was an informal policy with noted exceptions and no discipline.

CONCLUSIONS OF LAW

(1) Based on the record, I find that the Board has statutory and discretionary jurisdiction; that Respondent Scepter is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that Local the Union is a statutory labor organization; that Scepter violated Section 8(a)(5) and (1) of the Act, and that Scepter's violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

(2) At all times since April 29, 1993, the Union has been and is the exclusive representative of all the employees in the appropriate unit set forth below for purposes of collective bargaining with respect to wages, rates of pay, hours of employment, and other terms and conditions of employment within the meaning of Section 9(a) of the Act:

[3] See *Peerless Food Products,* 236 NLRB 161 (1978).

All production and maintenance employees, shipping and receiving department employees, laboratory technician and custodians employed at Scepter Ingot Castings' New Johnsonville, Tennessee facility; *excluding* all office clerical employees, metal control clerk, personnel clerk/purchasing agent, plant manager, plant engineer/maintenance superintendent, production technical manager, cast house general foreman, rotary general foreman, all working foremen, professional employees, guards and supervisors as defined in the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent Scepter having discharged an employee as a result of the unilateral changes imposed on November 17, 1995, Scepter must offer the employee full reinstatement and make him whole, with interest, and bargain with the Union over the decisions and the effects of those decisions. The loss of earnings and other benefits must be computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Scepter Ingot Castings, Inc., New Johnsonville, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to recognize and to bargain collectively in good faith with the Union as the exclusive representative of all its employees in the unit described below.

(b) Unilaterally granting pay raises to bargaining unit employees without first consulting with the Union and offering the Union the opportunity to bargain over the decision and the effects of such pay increases.

(c) Unilaterally changing medical insurance coverage or rates for bargaining unit employees without first consulting with the Union and offering the Union the opportunity to bargain over the decision and the effects of such proposed changes.

(d) Unilaterally changing work rules without affording the Union prior notice and an opportunity to negotiate and bargain concerning the decision and the effects of such proposed changes.

(e) Unilaterally requiring employees to sign a policy statement reflecting the unilateral change in work rules.

(f) Discharging employees who refuse to sign the policy statement reflecting the unilaterally imposed change in work rules.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All production and maintenance employees, shipping and receiving department employees, and custodians employed at Scepter Ingot Castings' New Johnsonville, Tennessee facility; *excluding* all office clerical employees, metal control clerk, personnel clerk/purchasing agent, plant manager, plant engineer/maintenance superintendent, production technical manager, cast house general foreman, rotary general foreman, all working foremen, professional employees, guards and supervisors as defined in the Act.

(b) Within 14 days from the date of this Order, offer Stephen L. Merrell full reinstatement to his former job or, if that job no longer exists, reinstatement to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Stephen L. Merrell whole for any loss of earnings and other benefits suffered as a result of the unlawful action against him, in the manner set forth in the Remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Stephen L. Merrell, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(e) On request of the Union, rescind its November 17, 1995 policy statement prohibiting placing steel in furnaces and thereafter notify and, on request, bargain with the Union over the decision to implement such a work rule and the effect of implementing such a work rule and the requiring of employees to sign it.

(f) If requested by the Union, rescind either or both of the early October 1995 unilateral changes concerning wage rates and medical insurance coverage, and thereafter notify and, on request, bargain with the Union over the decision to implement such proposed changes and the effects of such changes.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its New Johnsonville, Tennessee facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 30, 1995 (the date the original charge was filed and served in this proceeding).

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification by a responsible official of a form provided by the Region attesting to the steps that the Respondent has taken to comply.